No. 14833

United States Court of Appeals

For the Ninth Circuit

KENNETH GLEN MADSEN, *Appellant,*

vs.

HAROLD H. HINSHAW, Sheriff of Skagit County, Washington; WILLIAM B. PARSONS, United States Marshal for the Western District of Washington; and Honorable HERBERT BROWNELL, Attorney General of the United States, *Appellees.*

APPEAL FROM THE UNITED STATES DISTRICT COURT OF THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

BRIEF OF APPELLANT

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KENNETH C. DAVIS
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APPEAL FROM THE UNITED STATES DISTRICT COURT OF THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

BRIEF OF APPELLANT

STATEMENT OF JURISDICTION

Appellant filed his petition for Habeas Corpus in the United States District Court for the Western District of Washington, Northern Division (R. 3 to 82). It was dismissed without the District Court entering a show cause order or holding a hearing (R. 82 to 92). Appellant then filed a motion to reconsider the order of dismissal and also an amended petition for a writ of Habeas Corpus (R. 92 to 95). The motion to reconsider was denied and, without granting a show cause order or holding a hearing, the amended petition was dismissed (R. 96 to 99). No other pleadings were filed.

JURISDICTION OF THE DISTRICT COURT

Under both Article I, Section 9, of the United States Constitution, and under Sections 2241 through 2254 of Title 28 U.S.C.A., appellant had the right to petition the District Court for Habeas Corpus relief and the District Court had jurisdiction to grant him a hearing on the allegations of his petition and, upon his meeting his burden of proof concerning their verity, to grant the writ. Appellant contends 28 U.S.C.A. § 2255 is not applicable to the courts of Alaska when they sit as Alaska Territorial District Courts rather than as United States District Courts and, therefore, that Section 2255 did not deprive the District Court at Seattle, Washington, of jurisdiction. Appellant also contends that, even if 28 U.S.C.A. § 2255 is applicable to Alaska Territorial Courts, it is inadequate and ineffective in his case to test the legality of his detention; and that the sentencing court has neither yielded nor denied him relief and that under the very provisions of § 2255 the District Court of the Western District of Washington had jurisdiction of his Habeas Corpus proceeding.

JURISDICTION OF COURT OF APPEALS

The jurisdiction of the United States Court of Appeals for the Ninth Circuit rests in Title 28, U.S.C.A. § 1291, which gives to the Court of Appeals jurisdiction of all appeals from final decisions of the District Courts of the United States. Appellant has, pursuant to Rule 73 of the Federal Rules of Civil Procedure, given due and proper Notice of Appeal (R. 100) and has filed a proper cost bond (R. 101, 102) and has otherwise prosecuted his appeal.

STATEMENT OF THE CASE

On August 6, 1954, appellant became involved in an incident in the Territory of Alaska at Ketchikan, which resulted in the death of one Raymond Tamatsu Aria, by shooting (R. 4, 5). Within a few hours of the shooting appellant was arrested and incarcerated, and on October 25, 1954, he was indicted for First Degree Murder by a Grand Jury (R. 4, 5). This Grand Jury sat for the District Court for the District of Alaska and charged appellant with violation of section 65-4-1 of the Alaska Compiled Laws Annotated (1949), which section defines Murder in the First Degree. Appellant was sixteen years of age at the time of the shooting. In Alaska, First Degree Murder is a capital offense, it carries with it a mandatory death penalty unless the jury affirmatively recommends life imprisonment (R. 4, A.C.L.A. § 65-4-1 and § 65-4-2).

On December 7, 1954, it was adjudged, by the District Court for the District of Alaska, that appellant " . . . has been found guilty on his plea of guilty to the crime of Second Degree Murder, the same being an offense . . . included in the crime of First Degree Murder as charged in the Indictment . . ." It was also adjudged that appellant " . . . is hereby committed to the custody of the attorney general . . . for imprisonment for a period of twenty-five (25) years" (R. 23, 24).

Within a few days after this commitment appellant was en route to the Federal Reformatory at El Reno, Oklahoma. The route of his journey took him to Seattle, Washington. Appellant's present attorneys secured an order from the Justice Department in Washington,

D.C., causing appellant to be stopped and held in Seattle. Subsequently appellant was transferred to and held in the Skagit County, Washington, Jail at Mount Vernon, Washington. This action by the Justice Department was for the sole purpose of allowing appellant an opportunity to seek relief from his commitment through post-conviction remedies.

On April 13, 1955, appellant filed, in the United States District Court for the Western District of Washington, Northern Division, his petition for a Writ of Habeas Corpus. In his petition appellant alleged that he had secured from the clerk of the Alaska District Court a true and complete transcript of all court records in his Alaska case and that he had also secured a true and complete transcript of the reporter's record of what transpired in the Alaska District Court, and that he would file these documents as exhibits with his petition (R. 25). This he did (R. 85). On May 6, 1955, the District Court, without granting an order to show cause, or holding a hearing, entered a decision and order dismissing the petition (R. 82 to 92).

On May 10, 1955, appellant filed a written motion asking the District Court to reconsider its order of May 6, 1955, and, at the same time, he also filed an amended petition for a Writ of Habeas Corpus (R. 92 to 95). On May 26, 1955, the District Court again, without granting an order to show cause or holding a hearing, entered a memorandum decision and order denying the motion to reconsider and dismissing the amended petition (R. 96 to 99). It is from this latter order of dismissal that appellant appeals (R. 100).

In his amended petition for a Writ of Habeas Corpus, appellant alleges detailed facts (R. 3 to 82 and R. 92 to 95) showing, if true, that he was deprived of both due process of law as guaranteed by the Fifth Amendment to the Constitution of the United States and of his right to counsel as guaranteed by the Sixth Amendment to said Constitution. He also properly makes allegations concerning his alleged unlawful detention, within the territorial jurisdiction of the District Court (R. 3, 4). His other allegations, summarized, are:

That he was a youth sixteen years of age at the time of the alleged crime (R. 4, 41, 42, 45), and but seventeen years of age at the time he petitioned the District Court for Habeas Corpus relief (R. 14, 45); that he was unlearned, inexperienced, unqualified and incapable of asserting his legal rights, protecting his interests or of representing himself in a criminal proceeding (R. 20, 21); that he had only an eighth-grade education (R. 14), was entirely unversed in the law (R. 21, 44), and had no qualities of learning or experience calculated to enable him to protect himself in the give-and-take of a courtroom trial (R. 21); that a few days after his incarceration, and as a result of the shock incident to the alleged crime, his mother died (R. 45, 52), and he was left in a mental state of quandary, confusion and bewilderment (R. 45); that he was denied the right to see his father until after he was committed to await action of the Grand Jury on a charge of Murder in the First Degree (R. 14); and, that he worried a great deal about his folks not coming to see him while in jail, because his family had always been very close (R. 52). He further alleges that the Alaska District

Court was without jurisdiction to even make the record pursuant to which he now stands committed for twenty-five years imprisonment (R. 14), because his rights as a juvenile, as defined by the Alaska juvenile laws (R. 8 to 13), though never waived by word or action (R. 13), were totally and wrongfully denied him, all to his extreme prejudice (R. 13). He further alleges that he and his father employed one J. Lael Simmons of Seattle, a well-qualified, competent attorney of his own choosing to represent him (R. 5, 6, 7) and that without notice to himself or his counsel (R. 7, 43), he was improperly, summarily, capriciously and arbitrarily denied the right to be heard or represented by this counsel (R. 7, 40); that this counsel was, without notice or hearing and arbitrarily (R. 8), capriciously and without warrant (R. 7, 92) summarily ejected from further participating in the case on the very day appellant was to face trial on a First Degree Murder charge (R. 7, 43), although this counsel was thoroughly prepared to proceed to trial (R. 5, 6, 7, 42), and that appellant was thereby greatly prejudiced in the defense of his case (R. 7); that, as a result of the summary ejection of his counsel, he was bewildered and confused and sick at heart, and when he sought the guiding hand of his counsel, who was present in the courtroom, he was, without cause, denied the right to even communicate with him (R. 7, 40); that he thereafter sought a reasonable continuance in order that he might secure other competent counsel of his own choosing, but that his request was abruptly, unjustly, wrongfully, and against all American standards of fair-play dogmatically denied (R. 15), in spite of the fact that the court

was thoroughly informed that he could and would obtain another counsel of his own choosing if given a reasonable opportunity to so do (R. 15, 16); that he was compelled, against his will, pursuant to definite directions of the court, to take a pauper's oath (R. 15, 16, 44, 54), so that the court might appoint attorneys to represent him (R. 16); that his hopes for a fair trial were shattered when his chosen attorney was ejected (R. 54); that he was afraid of the judge, everybody stared at him, he felt uneasy and "beat" and would probably have done anything he was told to do at the time of taking this pauper's oath (R. 54); that he was again denied a requested continuance (R. 61), so he might secure other counsel of his own choosing (R. 61, 62); that the court appointed two unwilling young attorneys, who knew nothing about the case, to represent him, wholly against his stated wishes (R. 16), although these same two attorneys had, only minutes previously, stated in open court that they did not want to have anything to do with the case, that in no event would they go to trial on appellant's behalf and that appellant did not want them to have anything to do with the case (R. 17); that his two appointed attorneys requested a reasonable continuance, which request was, without just cause, arbitrarily denied (R. 18) and these appointed attorneys were thereby denied adequate time in which to prepare appellant's case (R. 45); that these appointed attorneys, by a despotic misuse of judicial power (R. 18), were denied the right to consult with appellant's chosen counsel or avail themselves of any of the fruits of his three months labor on the case, under pain of contempt (R. 18, 40, 45);

that, as a result, these appointed attorneys were obliged to enter upon appellant's trial unprepared (R. 19); that these appointed attorneys were unqualified, inadequate, inexperienced, incompetent (R. 17, 18), and fell below the very minimum standards required of attorneys defending a person charged with a capital offense (R. 19), which resulted in appellant's trial attempt being a farce, sham and a mockery of justice (R. 19); that of these two appointed attorneys, the one with the wider experience, just minutes before his appointment, told appellant that he did not want to handle the case and was not qualified for a murder trial (R. 19), and subsequent to his appointment this same attorney told appellant he did not want to handle the case, but he was "stuck" with it (R. 19); that this same attorney informed appellant his case was very weak and the prosecution's was very strong, and appellant would probably be convicted and there was a good chance, on conviction, he would be hanged (R. 19, 20); that these appointed attorneys, individually (R. 19, 20), and in concert with the United States District Attorneys (R. 56, 62, 63) and the Alaska District Court judge (R. 20, 64, 66) induced and coerced appellant into a position of offering (R. 21, 22, 84) to withdraw his plea of not guilty to the crime of First Degree Murder and enter a plea of guilty to the crime of Second Degree Murder; that his offer to so plead was a natural result of these inducements, and appellant through fear, misrepresentation, ignorance, lack of knowledge of our spoken language, lack of knowledge of the ways of judicial procedure, persuasion based on false statements, lack of comprehension of the consequences of his act

and because of his youth and inexperience was, blindly led into that position (R. 21); that he never did withdraw his plea of not guilty to the crime of Murder in the First Degree (R. 22), and that he never in person or otherwise, consciously or wittingly entered a plea of guilty to the crime of Second Degree Murder (R. 22). He further alleges that he has twice sought relief under Title 28 U.S.C.A. § 2255 by proper and adequate motion, through two different attorneys, but he has arbitrarily been denied the right to even be heard by the trial court (R. 25), and that the trial judge refused to permit counsel of his own choosing, other than J. Lael Simmons, including Alaska counsel, to be heard or to file his motion under § 2255 (R. 25). He further alleges that the remedy by motion under § 2255 has been wholly a hardship in the extreme (R. 93); that the Alaska court has twice foreclosed him in his efforts to obtain relief under § 2255 (R. 93); that said court ordered its clerk not to file his motion under § 2255 (R. 95); that no order granting or denying him relief under § 2255 has been or would be entered because the trial court was totally prejudiced and unwilling and unable, to act fairly and independently in anything concerning appellant (R. 95); that no order having been or to be entered by the trial court appellant could not appeal and was stymied (R. 95), and that § 2255 was wholly inadequate and ineffective to test the legality of his detention (R. 25, 93). He further alleges that he is not guilty of any crime (R. 14, 18, 42, 56), and that he has never been in trouble except for traffic violations (R. 52); that his only effective remedy for relief from his unlawful detention is Habeas Corpus, and that at no time

in these proceedings, from the time of the summary ejection of the counsel of his choice, Mr. Simmons, *ex parte* and without a hearing or just cause, up until appellant was on his way to El Reno, Oklahoma, did he have the guiding hand of counsel of his own choosing (R. 40).

These summarized allegations present the constitutional questions involved, which are: (1) whether or not appellant has been deprived of his constitutional right to Habeas Corpus as guaranteed by Article I, Section 9; (2) whether or not he has been deprived of his liberty without due process of law as guaranteed by the Fifth Amendment of the Constitution of the United States, and (3) whether or not he has been deprived of his liberty without benefit of counsel as guaranteed by the Sixth Amendment of the Constitution of the United States. These questions are all raised by the allegations of the amended petition for a Writ of Habeas Corpus, which was the only pleading before the District Court. The District Court also had the entire trial court record before it (R. 85) at the time of making the ruling which is the basis of this appeal.

SPECIFICATION OF ERROR

After considering the same on the merits, the United States District Court for the Western District of Washington, Northern Division, erred in dismissing Appellant's Amended Petition for a Writ of Habeas Corpus, without granting a show cause order and holding a hearing.

ARGUMENT

I. The doctrine of *res judicata* has no application to Habeas Corpus cases.

The District Court, in its Memorandum Decision and Order (R. 96) said, *inter alia*:

> "Passing the question of whether petitioner's Motion to Reconsider and Amended Petition for a Writ of Habeas Corpus is properly before the court . . . "

This language by the Washington District Court stems from the fact that the Court was concerned about whether or not the doctrine of *res judicata* applied to Habeas Corpus cases and therefore foreclosed the Appellant from bringing his amended petition. Appellant urged upon the Court that *res judicata* did not apply to Habeas Corpus cases and the Court passed the question. Appellant does not seek to labor the point of *res judicata* on appeal. However, cases deemed by Appellant to be directly in point, holding that the doctrine *res judicata* does not apply to Habeas Corpus cases, are here cited out of an abundance of caution. Supreme Court cases: *Salingen v. Loisel* (1923) 265 U.S. 224, 44 S.Ct. 519, 521; *Wong Doo v. United States* (1924) 265 U.S. 239, 44 S.Ct. 524; *Waley v. Johnston* (1942) 316 U.S. 101, 62 S.Ct. 964; *Price v. Johnston* (1948) 334 U.S. 266, 68 S.Ct. 1049, 1062; *Darr v. Burford* (1950) 339 U.S. 200, 70 S.Ct. 587, 596; *Brown v. Allen* (1953) 344 U.S. 443, 73 S.Ct. 397, 411; *United States v. Shaughnessy* (1954) 347 U.S. 265, 74 S.Ct. 499, 503; *Massey v. Moore* (1954) 348 U.S. 105, 75 S.Ct. 145. Court of Appeals cases: *Coggins v. O'Brien* (1 Cir., 1951) 188 F.2d 130; *United States v. Shaughnessy* (2

Cir., 1953) 206 F.2d 392; *United States v. Shaughnessy* (2 Cir., 1953) 206 F.2d 897; *United States v. Hiatt* (3 Cir., 1944) 141 F.2d 664; *United States v. Burke* (3 Cir., 1949) 173 F.2d 544; *Slaughter v. Wright* (4 Cir., 1943) 135 F.2d 613; *Wells v. United States* (5 Cir., 1947) 158 F.2d 833; *Collins v. United States* (8 Cir., 1953) 206 F.2d 918; *Hall v. Johnston* (9 Cir., 1937) 91 F.2d 263; *Fisher v. Johnston* (9 Cir., 1938) 95 F.2d 36; *Kerr v. Squier* (9 Cir., 1945) 151 F.2d 308; *Waley v. Johnston* (9 Cir., 1947) 163 F.2d 556; *Chessman v. Teets* (9 Cir., 1955) 221 F.2d 276; *Pope v. Huff* (U.S. Court of Appeals for D.C., 1944) 141 F.2d 727; *Rookard v. Huff* (U.S. Court of Appeals for D.C., 1944) 145 F.2d 708; *Dorsey v. Gill* (U.S. Court of Appeals for D.C., 1945) 148 F.2d 857.

II. Uncontroverted factual allegations of a petition for a Writ of Habeas Corpus MUST be accepted as true, so long as they are not repudiated by the records of the trial court and it cannot be said, as a matter of law, that they are insufficient to raise a jurisdictional or constitutional question.

In *Frank v. Mangum* (1915) 237 U.S. 309, 35 S.Ct. 582, 596, Judge Holmes' dissenting opinion (concurred in by Judge Hughes) stated the present law. In *Moore v. Dempsey* (1923) 261 U.S. 86, 43 S.Ct. 265, Judge Holmes, this time writing for the majority, again stated the present law. His dissent in the *Frank v. Mangum* case does not differ from his opinion in *Moore v. Dempsey*. In *Frank v. Mangum,* Judge Holmes said:

> "Of course we are speaking of the case made by the petition, and whether it ought to be heard.

Upon allegations of this gravity in our opinion it ought to be heard . . ."

In *Walker v. Johnston* (1941) 312 U.S. 275, 61 S.Ct. 574, 579, the Supreme Court said:

"The Government's contention that his allegations are improbable and unbelievable cannot serve to deny him an opportunity to support them by evidence. On this record it is his right to be heard."

In *Williams v. Kaiser* (1945) 323 U.S. 474, 65 S.Ct. 363, 365, the Supreme Court said:

"The petition for habeas corpus was denied without requiring the State to answer or without giving petitioner an opportunity to prove his allegations. And the allegations contained in the petition are not inconsistent with the recitals of the certified copy of the sentence and judgment which accompanied the petition and under which petitioner is confined. Hence we must assume that the allegations of the petition are true."

In *House v. Mayo* (1945) 324 U.S. 49, 65 S.Ct. 517, 520, the Supreme Court said:

"Since the petition for habeas corpus was denied without requiring the respondent to answer and without a hearing, we must assume that the petitioner's allegations are true."

In *White v. Ragen* (1945) 324 U.S. 766, 65 S.Ct. 978, 980, the Supreme Court said:

"Since the Supreme Court of Illinois dismissed both petitions without requiring respondent to answer, we must assume that the petitioner's allegations are true."

In *Hawk v. Olson* (1945) 326 U.S. 271, 66 S.Ct. 116, 117, the Supreme Court said:

> "As no response was filed or evidence received in the district court, we accept as true all well-pleaded allegations of the petition and, in the exercise of the duty which lies on us as well as the Nebraska courts to safeguard the federal constitutional rights of petitioner, examine for ourselves whether under the facts stated the petitioner is now entitled to a hearing on the claimed violations of the due process clause in his conviction for murder in the first degree."

In *Palmer v. Ashe* (1951) 342 U.S. 134, 72 S.Ct. 191, 192, the Supreme Court said:

> "We must look to the petition and answers to determine whether the particular circumstances alleged are sufficient to entitle petitioner to a judicial hearing."

In *U.S. v. Hayman* (1951) 342 U.S. 205, 72 S.Ct. 263, 267, the Supreme Court said the question is whether or not the petition:

> " * * * states grounds to support a collateral attack on his sentence and raises substantial issues of fact calling for an inquiry into their verity."

In *U.S. v. Morgan* (1954) 346 U.S. 502, 74 S.Ct. 247, 253, the Supreme Court said:

> "In this state of the record we cannot know the facts and thus we must rely on respondents' allegations."

In *Massey v. Moore* (1954) 348 U.S. 105, 75 S.Ct. 145, the Supreme Court said:

> "On the present pleadings we must take as true the allegation of mental incapacity at the time of the trial."

"We do not intimate an opinion on the merits, for we do not know what facts the hearing will produce. We only rule that if the allegations charged are proven, petitioner has been deprived of his liberty without due process of law."

In *Chessman v. Teets* (Oct. 17, 1955) ..... U.S. ....., 76 S.Ct. 34, the Supreme Court said:

"On the record before us, there is no denial of petitioner's allegations. The District Court, without issuing the writ or an order to show cause, dismissed the application as not stating a cause of action.

"Without intimating any opinion regarding the validity of the claim, we hold that in the circumstances disclosed by the record before us the application should not have been summarily dismissed."

Court of Appeals cases for the Ninth Circuit, directly in point, follow:

Price v. Johnston (9 Cir., 1942) 125 F.2d 806:

"No hearing was had in this case, the court entering its order on the pleadings filed. The question before us is whether the court below erred in not granting a hearing. To state it differently, Did it appear 'from the petition itself that the party' was 'not entitled' to a writ, or did the application and traverse raise substantial issues of fact so as to require the court below to grant petitioner a hearing?"

Lynch v. Johnston (9 Cir., 1947) 160 F.2d 950, 951:

"Where, as here, no order to show cause is issued and no return is made or hearing had, the law requires that all of the allegations of fact contained in the petition be treated as true."

Carlson v. Landon (9 Cir., 1950) 186 F.2d 183, 188:

> "There is no denial of petitioner's allegations as to residence, family status, his attendance upon hearings under the 1947 warrant, and these allegations must be taken as true."

Mangaoang v. Boyd (9 Cir., 1950) 186 F.2d 191, 194:

> "We deem it advisable at this juncture to mention the rule that the undenied allegations of the pleadings are to be taken as true."

Thomas v. Teets (9 Cir., 1953) 205 F2d 236, 238 (Seven Judges, Certiorari Denied 74 S.Ct. 240):

> "Thomas appeals from an order denying his application for a writ of habeas corpus without issuing the writ or an order to show cause and the first question before us is whether his application states a ground which, if true, warrants the issuance of the writ or show cause order.
>
> "We are required to assume these allegations are true."

Other Court of Appeals cases, directly in point, are:

United States v. Rosenberg et al. (2 Cir., 1952) 200 F.2d 666, 668:

> "Since Judge Ryan held no hearing at which testimony could be presented, it is necessary to treat as true all facts stated in the petitions and in accompanying affidavits and exhibits, and to disregard all contrary statements of fact in the government's affidavits."

United States v. Hiatt (3 Cir., 1944) 141 F.2d 664:

> 665 "Upon these appeals, however, we must assume that the relator's allegations are true since the question before us is whether the district court erred in refusing the issuance of writs under which their truth might be inquired into."

United States v. Baldi (3 Cir., 1952) 198 F.2d 113, 117:

> "If relator's allegations are true, his confession was clearly coerced, and the concept of due process would void his trial * * * [citation] * * * Hence, on the basis of the record before us, the district court erred in dismissing the petition without a hearing."

United States v. Baldi (3 Cir., 1952) 195 F.2d 815, 822:

> " * * * the allegations of the petition that vital evidence 'was wilfully concealed' must be taken to be true since no hearing was had."

United States v. Handy (3 Cir., 1953) 203 F.2d 407 (Seven Judges, *Certiorari* denied 74 S.Ct. 103):

> " * * * the 'undisputed' and 'incontrovertible' facts which appear from the record made in the Court of Oyer and Terminer are insufficient to controvert the broad allegations of the petition."

Atkins v. Moore (5 Cir., 1955) 218 F.2d 637:

> "It seems clear to us that, if what petitioner alleges is true, his conviction should not be allowed to stand."

Loper v. Ellis (5 Cir., 1955) 224 F.2d 901, 903:

> "Taking these allegations of the petition at their face value, as we necessarily must do * * * " (The court disposed of the case on this premise.)

United States v. Sturm (7 Cir., 1950) 180 F.2d 413 (§ 2255 motion):

> "Since the trial court denied the motion without granting a hearing thereon or making findings of fact and conclusions of law with respect thereto, its order was proper only if 'the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief * * * ' That,

then, is the sole question before us on this appeal. In its resolution, we must, of course, accept as true and correct the averments of fact contained in the motion, insofar as they are not inconsistent with the record, and, on that basis, proceed to determine if they entitle defendant to the hearing denied him."

United States v. Davis (7 Cir., 1954) 212 F.2d 264:

"Thus, since the District Court denied the motion without a hearing and attendant findings of fact and conclusions of law, its order was proper only if the motion and record show conclusively that the defendant was entitled to no relief. Otherwise, the order must be set aside and the cause remanded for a hearing [citing *U. S. v. Hayman*]. We must, of course, in considering the narrow question thus presented, accept as true the allegations of fact contained in the motion except as they may be contradicted by the record.

"It is not open to doubt that the defendant's motion alleges matters of a serious and substantial character."

Sisk v. Overlade (7 Cir., 1955) 220 F.2d 68:

"Upon the filing of the petition the district judge had authority to issue the writ or he could have issued an order to show cause why the writ should not be granted. Title 28 U.S.C.A. § 2243. He did neither, but entered an order denying the writ without a hearing. This procedure could be followed only on the basis that the facts contained in the petition showed that petitioner was not entitled to a writ; in other words, that a *prima facie* case had not been shown. In this posture there is no denial or answer to any of the allegations of

fact in the petition, and on this appeal we must consider such allegations as being true."

White v. Pescor (8 Cir., 1946) 155 F.2d 902:

"Sections 454 to 461 [now sections 2242 and 2243] both inclusive, Title 28 U.S.C.A., prescribe the procedure to be followed, and we cannot agree that the allegations of the petition to the effect that petitioner was denied his constitutional right to assistance of counsel were insufficient as a matter of law to entitle plaintiff to the relief sought."

Davis v. United States (8 Cir., 1954) 210 F.2d 18:

"Observations and experience compel the conclusion that in many instances allegations such as those now under consideration are not honestly made and constitute barefaced perjury. In many other instances lapse of time and wishful thinking ripen into a conviction that events were as alleged, when in fact they were not. But however onerous the burden may be, the protection of the rights of persons in the comparatively few meritorious cases requires the careful adherence to our traditions of judicial proceedings in all cases, in order that the few may be discovered."

Ex Parte Rosier (U.S. Ct. of App. for Dis. of Col., 1942) 133 F.2d 316:

"These allegations alone, if true—and as we have pointed out above they must at this stage of a habeas corpus proceeding be taken as true, as if on demurrer, and this even if improbable or unbelievable (which on their face they were not)—stated a cause of action for release."

It was also proper for the appellant to incorporate, by reference, his first petition within his second. (Cf. *Thomas v. Duffy* (9 Cir., 1950) 191 F.2d 360.)

III. When it cannot be said, as a matter of law, that the factual allegations of a petition for Writ of Habeas Corpus are insufficient to raise a jurisdictional or constitutional question, then it becomes the ABSOLUTE DUTY of the petitioned court to hold a hearing, receive evidence and pronounce the allegations true or false.

In *Moore v. Dempsey* (1923) 261 U.S. 86, 43 S.Ct. 265, 267, the Supreme Court said:

> "We shall not say more concerning the corrective process afforded to the petitioners than that it does not seem to us sufficient to allow a Judge of the United States to escape the duty of examining the facts for himself when if true as alleged they make the trial absolutely void. We have confined the statement to facts admitted by the demurrer. We will not say that they cannot be met, but it appears to us unavoidable the District Judge should find whether the facts alleged are true . . . "

In *Johnston v. Zerbst* (1938) 304 U.S. 458, 58 S.Ct. 1019, 1023, the Supreme Court said:

> "The constitutional right of an accused to be represented by counsel invokes, of itself, the protection of a trial court, in which the accused—whose life or liberty is at stake—is without counsel. This protecting duty imposes the serious and weighty responsibility upon the trial judge of determining whether there is an intelligent and competent waiver by the accused. While an accused may waive the right to counsel, whether there is a proper waiver should be clearly determined by the trial court, and it would be fitting and appropriate for that determination to appear upon the record."
>
> "The scope of inquiry in habeas corpus proceed-

ings has been broadened—not narrowed—since the adoption of the Sixth Amendment. In such a proceeding, 'it would be clearly erroneous to confine the inquiry to the proceedings and judgment of the trial court' and the petitioned court has 'power to inquire with regard to the jurisdiction of the inferior court, either in respect to the subject-matter, or to the person, even if such inquiry [involves] an examination of facts outside of, but not inconsistent with, the record.''

'' . . . applicant is put upon his oath to set forth the truth of the matter respecting the causes of his detention, and the court, upon determining the actual facts, is to 'dispose the party as law and justice require.''

In *Walker v. Johnston* (1941) 312 U.S. 275, 61 S.Ct. 574, 577, the Supreme Court said:

'' . . . a judicial inquiry involves the reception of testimony, as the language of the statute shows.''

''The Government properly concedes that if the petition, the return, and the traverse raise substantial issues of fact it is the petitioner's right to have those issues heard and determined in the manner the statutes prescribes.''

On page 579, the Court said:

''In other Circuits, if an issue of fact is presented, the practice appears to have been to issue the writ, have the petitioner produced and hold a hearing at which evidence is received. This is, we think, the only admissible procedure. Nothing less will satisfy the command of the statute that the Judge shall proceed 'to determine the facts of the case, by hearing the testimony and arguments.' ''

''Not by the pleadings and the affidavits, but by the whole of the testimony, must it be determined

whether the petitioner has carried his burden of proof and shown his rights to a discharge. The Government's contention that his allegations are improbable and unbelievable cannot serve to deny him an opportunity to support them by evidence."

Allegations concerning the denial of a twenty-four hour continuance in order that the accused might consult counsel are found in *Hawk v. Olson* (1945) 326 U.S. 271, 66 S.Ct. 116, and the Supreme Court says:

"These facts, if true, we think, set out a violation of the Fourteenth Amendment. They are not conclusions of law. They are not too vague."

In *U. S. v. Hayman* (1951) 342 U.S. 205, 72 S.Ct. 263, the Supreme Court said:

"Respondent, denied an opportunity to be heard, 'has lost something indispensable, however convincing the *ex parte* showing."

In *U. S. v. Shaughnessy* (1954) 347 U.S. 260, 74 S.Ct. 499, 504, the Supreme Court said:

"Of course, he may be unable to prove his allegation before the District Court, but he is entitled to the opportunity to try."

In *United States v. Uhl* (2 Cir., 1943) 137 F.2d 858:

"In several recent cases the Supreme Court has discussed the procedure to be followed on applications for writs of habeas corpus. * * * [citations] * * * These authorities make it clear, as the district court recognized, that if the pleadings present any material issues of fact, the petitioner is entitled to have those issues determined in the manner prescribed by section 461 [now §2243] of 28 U.S.C.A., that is, 'by hearing the testimony and arguments.'"

In *United States v. Burke* (3 Cir., 1952) 196 F.2d 785, 788:

> "The Supreme Court has set forth the rule that a writ of habeas corpus searches the record back of the commitment. The writ places 'a duty on the court to explore the foundations, and pronounce them false or true.' *Hill v. U. S. ex rel. Wampler* (1936) 298 U.S. 460, 467, 56 S.Ct. 760, 763, 80 L.Ed. 1283."

In *U. S. v. Handy* (3 Cir., 1953) 203 F.2d 407, it was held that, if the records do not controvert the allegations, petitioner, on demand, must be allowed:

> "an opportunity to support his allegations by evidence and appropriate findings of fact and conclusions of law must be made."

In *Behrens v. Hironimus* (4 Cir., 1948) 166 F.2d 245, 248:

> "This duty of investigation can be discharged only by the judge at a hearing where evidence is received. *Holiday v. Johnston,* 313 U.S. 342, 550, 61 S.Ct. 1015, . . . "

In *McCrea v. Jackson* (6 Cir., 1945) 148 F.2d 193:

> "But in *Walker v. Johnston,* 312 U.S. 275, 285, 61 S.Ct. 574, 579, 85 L.Ed. 830, the Supreme Court declared that if an issue of fact is presented, the only permissible procedure is for the judge to issue the writ, have the petitioner produced, and hold a hearing at which evidence is received. Nothing less is deemed to satisfy the command of the statute that the judge shall proceed 'to determine the facts of the case, by hearing the testimony and arguments.' "

In the *McCrea v. Jackson* case the court refers to the

case of *Holiday v. Johnston* (1941) 313 U.S. 342, 61 S.Ct. 1015, and says:

> "It was pointed out that Congress has seen fit to lodge in the judge the duty of investigation; that the petitioner must be afforded the right plainly accorded him by the statute of testifying before the judge; that neither the hearing of the testimony of the witnesses nor the weighing and appraising thereof may be delegated to a master; but that the judge personally must perform this function, find the facts and base his disposition of the cause upon his findings. Upon these principles, the discharge of the writ of habeas corpus was reversed and the cause remanded for a determination of the issues of fact upon a further hearing."

In *Wheatley v. U. S.* (10 Cir., 1952) 198 F.2d 325, the court speaking on the matter of the sufficiency of the petitioner's allegations said at page 327:

> "It may be that the charge is a figment of petitioner's imagination, but it cannot be said as a matter of law that the allegation was so frivolous that it could be brushed aside without a hearing."

In *Kirk v. Squier* (9 Cir., 1945) 150 F.2d 3, 5 (footnote 2), we find additional power in the petitioned court:

> "The Federal District Court takes judicial notice of the statutes and judicial decisions of the State of Calif. * * * "

In *McGuire v. Hunter* (10 Cir., 1943) 138 F.2d 379:

> "The remaining contention is that the court below failed to accord petitioner a full and complete hearing. Where in a case of this kind a material issue of fact is presented, it is the duty of the court to have the petitioner produced in court and hold

a hearing at which an opportunity is afforded to present evidence."

IV. Habeas Corpus is the "Great Writ of Freedom." It is often an individual citizen's only safeguard against being deprived of his life or liberty in violation of his constitutional rights. Habeas Corpus is guaranteed by the Constitution of the United States and there is no higher duty than to maintain it unimpaired.

In *Frank v. Mangum* (1915) 237 U.S. 309, 35 S. Ct. 582, the Supreme Court said:

> "But habeas corpus cuts through all forms and goes to the very issue of the structure. It comes in from the outside, not in subordination to the proceedings, and although every form may have been preserved, opens the inquiry whether they have been more than an empty shell."

In *Copeland v. Archer* (1931) 50 F.2d 836, 838, the court said:

> "The Writ of Habeas Corpus is a summary means of obtaining justice, but it is a real guarantee of the rights of the individual citizen."

In *Bowen v. Johnston* (1939) 306 U.S. 19, 59 S.Ct. 442, 446, the Supreme Court said:

> "It must never be forgotten that the writ of habeas corpus is the precious safeguard of personal liberty and there is no higher duty than to maintain it unimpaired."

In *Price v. Johnston* (1948) 334 U.S. 266, 68 S.Ct. 1049, the Supreme Court said:

> "The writ of habeas corpus commands general recognition as the essential remedy to safeguard a citizen against imprisonment by State or Nation in violation of his constitutional rights."

V. If the jurisdictional limitations and requirements concerning juveniles as set forth in the Alaska juvenile laws have not been complied with, the Alaska District Court has no jurisdiction over a juvenile and cannot adjudge a juvenile guilty of a crime or commit a juvenile to be imprisoned.

The Alaska juvenile laws are complete and are not ambiguous (51-3-1 to 51-3-19 A.C.L.A. 1949, R. 8 to 13).

In 31 Am. Jur. 792, Juvenile Courts and Offenders, §17, we find:

> "In most jurisdictions the age limit is fixed at either sixteen, seventeen, or eighteen years. In some it exceeds eighteen years. The tendency of the more recent statutes is to make the age limit higher. The purposes of these statutes have a clear and distinct connection with age as related to discretion and character, and the legislatures have, in passing them, indulged the usual presumptions arising from human experience that there is ordinarily a lack of mature discretion, discriminating judgment, and stability of character in children under a certain age."

Page 785 §4:

> "In other words the welfare of the child lies at the very foundation of the statutory scheme."

Page 796 §27:

> "The nature of the jurisdiction is, therefore, like that of the statutes creating such courts, paternal and benevolent.
>
> "The provisions of a statute for proceedings against juvenile delinquents in juvenile courts only, are to be construed as *establishing certain jurisdictional limitations and requirements and not merely personal rights or privileges in favor*

of the juvenile which the latter may waive or not as he desires.'' (Emphasis added)

VI. The Sixth Amendment to the Constitution of the United States provides that an accused shall enjoy the right to have the Assistance of Counsel for his defense. If an accused does not competently and intelligently freely waive this right or if he is arbitrarily denied this right the Court is incomplete and without jurisdiction to render a valid judgment and commitment. This right includes the right to counsel of his own choosing.

In *Powell v. State of Alabama* (1932) 287 U.S. 45, 53 S.Ct. 55, the Supreme Court, after quoting the trial court proceedings in regard to the appointment of counsel, which proceedings were to some extent similar to the proceedings of the Alaska Court in the instant case, says:

> ''And in this casual fashion the matter of counsel in a capital case was disposed of.''

In the trial court an attorney addressing the court, said:

> ''Mr. Parks: Of course if they have counsel, I don't see the necessity of the Court appointing anybody . . . '' (With this the Court agreed)

The Supreme Court continued:

> ''In any event, the circumstance lends emphasis to the conclusion that during perhaps the most critical period of the proceedings against these defendants . . . when consultation, thorough-going investigation and preparation were vitally important, the defendants did not have the aid of counsel in any real sense, although they were as much entitled to such aid during that period as at the trial itself.

"It is not enough to assume that counsel thus precipitated into the case thought there was no defense, and exercised their last judgment in proceeding to trial without preparation. Neither they nor the court could say what a prompt and thorough-going investigation might disclose as to the facts. No attempt was made to investigate. No opportunity to do so was given. Defendants were immediately hurried to trial. Chief Justice Anderson, after disclaiming any intention to criticize harshly counsel who attempted to represent defendants at the trials, said: ' * * * The record indicates that the appearance was rather *pro forma* than zealous and active * * *.' Under the circumstances disclosed, we hold that defendants were not accorded the right to counsel in any substantial sense. To decide otherwise, would simply be to ignore actualities.

"That it would not have been an idle ceremony to have given the defendants reasonable opportunity to communicate with their families and endeavor to obtain counsel is demonstrated by the fact that every soon after conviction, able counsel appeared in their behalf. This was pointed out by Chief Justice Anderson in the course of his dissenting opinion. 'They * * * [defendants] * * * had little time or opportunity to get in touch with their families and friends * * * and time has demonstrated that they could or would have been represented by able counsel had a better opportunity been given by a reasonable delay in the trial of the cases judging from the number and activity of counsel that appeared immediately or shortly after their conviction.'

"It is hardly necessary to say that the right to counsel being conceded, a defendant should be af-

forded a fair opportunity to secure counsel of his own choice. Not only was that not done here, but such designation of counsel as was attempted was either so indefinite or so close upon the trial as to amount to a deniel of effective and substantial aid in that regard.

"If in any case, civil or criminal, a state or federal court were arbitrarily to refuse to hear a party by counsel, employed by and appearing for him, it reasonably may not be doubted that such a refusal would be a denial of a hearing, and, therefore, of due process in the constitutional sense."

In *Johnston v. Zerbst* (1938) 304 U.S. 458, 58 S.Ct. 1019, 1022, the Supreme Court said:

"The Sixth Amendment stands as a constant admonition that if the constitutional safeguards it provides be lost, justice will not 'still be done.'

"The ' * * * right to be heard would be in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he has a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him.'

"The determination of whether there has been an intelligent waiver of right to counsel must de-

pend, in each case, upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused.

"Since the Sixth Amendment constitutionally entitles one charged with crime to the assistance of counsel, compliance with the constitutional mandate is an essential jurisdictional prerequisite to a Federal Court's authority to deprive an accused of his life or liberty. When this right is properly waived, the assistance of counsel is no longer a necessary element of the Court's jurisdiction to proceed to conviction and sentence. If the accused, however, is not represented by counsel and has not competently and intelligently waived his constitutional right, the Sixth Amendment stands as a jurisdictional bar to a valid conviction and sentence depriving him of his life or his liberty. A court's jurisdiction at the beginning of a trial may be lost ' in the course of the proceedings' due to failure to complete the court—as the Sixth Amendment requires—by providing counsel for an accused who is unable to obtain counsel, who has not intelligently waived this constitutional guarantee, and whose life or liberty is at stake. If this requirement of the Sixth Amendment is not complied with, the court no longer has jurisdiction to proceed. The judgment or conviction pronounced by a court without jurisdiction is void, and one imprisoned thereunder may obtain release by habeas corpus. A judge of the United States—to whom a petition for habeas corpus is addressed—should be alert to examine 'the facts for himself, when, if true as alleged, they make the trial absolutely void.' "

In *Walker v. Johnston* (1941) 312 U.S. 275, 61 S.Ct. 574, 579, the Supreme Court said:

> "If he did not voluntarily waive his right to counsel, or if he was deceived or coerced . . . into entering a plea, he was deprived of a constitutional right."

In *Glasser v. United States* (1942) 315 U.S. 60, 62 S.Ct. 457, 467, the Supreme Court said:

> "The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial."

In *Williams v. Kaiser* (1945) 323 U.S. 474, 65 S.Ct. 363, 366, the Supreme Court said:

> "The decision to plead guilty is a decision to allow a judgment of conviction to be entered without a hearing — a decision which is irrevocable and which forecloses any possibility of establishing innocence. If we assume that petitioner committed a crime, we cannot know the degree of prejudice which the denial of counsel caused."

In *Hawk v. Olson* (1945) 326 U.S. 271, 66 S.Ct. 116, 118, 120, the Supreme Court said:

> "Denial of effective assistance of counsel does violate due process.
>
> "We hold that denial of opportunity to consult with counsel on any material step after indictment or similar charge and arraignment violates the Fourteenth Amendment."

In *Chandler v. Fretag* (1954) 348 U.S. 3, 75 S.Ct. 1, the Supreme Court said:

> **"Petitioner did not ask the trial judge to furnish him counsel rather, he asked for a continuance so**

that he could obtain his own. The distinction is well established in this Court's decisions. *Powell v. State of Alabama,* 287 U.S. 45, 71, 53 S.Ct. 55, 65, 77 L.Ed. 158; *Betts v. Brady,* 316 U.S. 455, 466, 468, 62 S.Ct. 1252, 1258, 1259, 96 L.Ed. 595; *House v. Mayo,* 324 U.S. 42, 46, 65 S.Ct. 517, 520, 89 L.Ed. 739. **Regardless of whether petitioner would have been entitled to the appointment of counsel, his right to be heard through his own counsel was unqualified.** See *Palko v. State of Connecticut,* 302 U.S. 319, 324-325, 58 S.Ct. 149, 151, 82 L.Ed. 288. As this Court stated over 20 years ago in *Powell v. State of Alabama, supra,* 287 U.S. at pages 68-69, 53 S.Ct. at page 64:

" 'What, then, does a hearing include? Historically and in practice, in our own country at least, it has always included the right to the aid of counsel when desired and provided by the party asserting the right. The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. *He requires the guiding hand of counsel at every step in the proceedings against him.* Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence. If

that be true of men of intelligence, how much more true is it of the ignorant and illiterate, or those of feeble intellect. *If in any case, civil or criminal, a state or federal court were arbitrarily to refuse to hear a party by counsel, employed by and appearing for him, it reasonably may not be doubted that such a refusal would be a denial of a hearing, and, therefore, of due process in the constitutional sense'* (Italics added)." [Italics are court's]

"A necessary corollary is that a defendant must be given a reasonable opportunity to employ and consult with counsel; otherwise, the right to be heard by counsel would be of little worth. *Avery v. State of Alabama,* 308 U.S. 444, 446, 60 S.Ct. 321, 322, 84 L.Ed. 377; *House v. Mayo,* 324 U.S. 42, 46, 65 S.Ct. 517, 520, 89 L.Ed. 739; *White v. Ragen,* 324 U.S. 760, 764, 65 S.Ct. 978, 980, 89 L.Ed. 1348; *Hawk v. Olson,* 326 U.S. 271, 277-278, 66 S.Ct. 116, 119-120, 90 L.Ed. 61. By denying petitioner any opportunity whatever to obtain counsel on the habitual criminal accusation, the trial court deprived him of due process of law as guaranteed by the Fourteenth Amendment.

"It follows that petitioner is being held by respondent under an invalid sentence. The judgment below, sustaining the denial of habeas corpus relief, is accordingly reversed." (Bold face emphasis only supplied)

Habeas Corpus may be sought even though plea of guilty was entered. The right to counsel as guaranteed by the 6th Amendment is applicable to those who enter such pleas as well as those convicted (*Evans v. Rives* (U.S. Court of Appeals for D.C., 1942) 126 F.2d 633).

In *Waley v. Johnston* (9 Cir., 1947) 163 F.2d 556,

this court held that compliance with Sixth Amendment is a condition precedent to jurisdiction.

In *Behrens v. Hironimus* (4 Cir., 1948) 166 F.2d 245, 247:

> "Congress his liberalized and expanded the concept of the writ of habeas corpus in the interest of the protection of individual liberties so that the federal courts must now examine all the facts concerning a person's detention and thereby insure that justice has been done [citing cases]. The Supreme Court has established that the guarantee of counsel by the Sixth Amendment to the Federal Constitution is a prerequisite which must be complied with in order to give a federal court jurisdiction to hear and determine a criminal case. Failure to provide an accused with adequate counsel, unless he has knowingly and intelligently waived this right, renders any conviction and sentence by such a court null and void, and one imprisoned thereby may be released by habeas corpus." [Citing *Johnston v. Zerbst* and *Walker v. Johnston*]

VII. A federal court is without jurisdiction to disbar an attorney for a contempt not committed in or near a hearing then being conducted, or for any other acts of alleged misconduct, without first giving him notice that his disbarment is being considered and affording him an opportunity to be heard in his defense. A purported disbarment lacking these elements is void, and deprives the attorney of due process of law and deprives his client of his right to counsel as guaranteed by the Sixth Amendment to the Constitution of the United States.

In *Laughlin v. Wheat* (U.S. Court of Appeals D.C., 1937) 95 F.2d 101, although there was an existing statute allowing the court to strike an attorney's name, after a charge was filed, the Court said:

> "The rule of general application is that all courts have power to punish attorneys as officers of same, for misbehavior in the practice of the profession, but the rule is also that in each instance where an attorney is charged by affidavit with fraud or malpractice the court on motion will as a preliminary step order him to appear and answer, and then deal with him as the facts may appear in the case. And this is true because upon a petition to disbar or suspend an attorney the latter has a right to notice and opportunity to be heard and therefore any order of disbarment or suspension entered upon an *ex parte* proceeding ought not to be sustained.
>
> "In the instant case the petition shows, and the answer admits, that the order of suspension was entered without notice or hearing and without opportunity to the accused to explain the transaction and, if he could, to vindicate his conduct. While we entertain no doubt that a court has jurisdiction

even in an informal hearing in a proper case to strike the name of an attorney from its rolls, we know of no case in state or federal courts in which it was held it could be done without affording the attorney reasonable notice and an opportunity to be heard in his defense. This is even more the case where the offense charged is indictable and there has been no conviction."

In *United States v. Bergamo* (3 Cir., 1946) 154 F.2d 31, 35:

"In the case at bar it is unnecessary to decide what might be the law if an out-of-the-district attorney, not in good standing at the bar of which he was a member, had attempted to conduct the defense in the case at bar; nor need we decide the issue of whether a district court of the United States may require out-of-the-district counsel to have associated with him in a criminal case a member of the bar of the district court before which he seeks to appear. If these be necessary conditions they were met in the instant case. To hold that defendants in a criminal trial may not be defended by out-of-the-district counsel selected by them is to vitiate the guarantees of the Sixth Amendment. Under the circumstances of the case at bar the defendants were deprived of the advice of counsel of their own choosing. Nor was their representation effective. Since they were deprived of a constitutional right the judgment of conviction pronounced by the court was void."

In *Cooper v. Hutchinson* (3 Cir., 1950) 184 F.2d 119, 123:

"We think it clear that limited to one case though the right of these attorneys to practice was, their standing with respect to this case was no different from that of any other regularly admitted

local lawyer. * * * While admission *pro hac vice* is stated in the rule to be in the discretion of the court, the rights and duties of an outside lawyer, once so admitted, appear to be the same as those of a local lawyer. We think that admission *pro hac vice,* as the rule seems to indicate, is for the entire 'cause' and that counsel so admitted in a capital case cannot be arbitrarily and capriciously removed without depriving their clients of rights conferred by the constitution."

In *In re Los Angeles County Pioneer Society* (9 Cir., 1954) 217 F.2d 190, 192:

"Appellant's contention is that such a proceeding without notice of its purpose and with its failure to afford an opportunity to oppose the disbarment, *contained in the already prepared order therefor,* denies him the due process of the Fifth Amendment in depriving him of his property in the right to practice law in the district.

"A federal court is without jurisdiction to disbar an attorney for a contempt not committed in or near a hearing then being conducted, where due process is denied him by failing to give him notice that his disbarment is being considered or by failing to give him an opportunity to prepare and present a defense." (Emphasis is by the Court)

VIII. The age and background of an accused are entitled to serious consideration in determining whether or not he has been afforded his constitutional rights or has competently, intelligently and knowingly waived them.

In *Powell v. State of Alabama* (1932) 287 U.S. 45, 53 S.Ct. 55, the Supreme Court said:

"The record does not disclose their ages, except

that one of them was nineteen; but the record clearly indicates that most, if not all, of them were youthful and they are constantly referred to as 'the boys.' They were ignorant and illiterate."

In *Walker v. Johnston* (1941) 312 U.S. 275, 61 S.Ct. 574, 577, the Supreme Court said:

"[Petitioner] asserts that he attended school to the fifth grade and had had no further schooling or education, was entirely unversed in the law and unable and unqualified to represent or act for himself in a criminal proceeding;"

In *Williams v. Huff* (U.S. Court of App. D.C., 1944) 142 F.2d 91, 92, the court quotes *Bonner v. Moran* (U.S. Ct. of App. for D.C., 1941) 126 F.2d 121, with approval as follows:

"In deference to common experience, there is general recognition of the fact that many persons by reason of their youth are incapable of intelligent decision, as the result of which public policy demands legal protection of their personal as well as their property rights.

"The universal law, therefore, is that a minor cannot be held liable on his personal contracts or contracts for the disposition of his property."

In *Curtis v. Hiatt* (3 Cir., 1947) 161 F.2d 621, 623:

"Petitioner alleges that he was duped into waiving counsel and pleading guilty through the machinations of the government agent in whose custody he was placed. This allegation must be considered in conjunction with those of his youth and previous record. 'It follows that the District Court should take evidence and determine whether, in the light of his age, education and information, and all other pertinent facts, he has sustained the bur-

den of proving that his waiver was not competent and intelligent.' "

In *Anderson v. Eidson* (8 Cir., 1951) 191 F.2d 989, the Court of Appeals reversed the District Court but quoted the following language of the District Court:

> "I entertain a strong feeling that justice demands that an 18-year-old boy should be provided with counsel, regardless of whether he requested it or refused it, considering that the offenses with which he was charged were of a most grave nature * * *. If it were a case arising under the federal jurisdiction, I would unhesitatingly grant the writ and review the matter * * *."

IX. It is a denial of due process of law to force an accused to trial without adequate time to prepare his defense.

In *Adams v. United States* (1943) 317 U.S. 269, 63 S.Ct. 235, 241, 242, the Supreme Court said:

> "An accused must have the means of presenting his best defense. He must have time and facilities for investigation and for the production of evidence. But evidence and truth are of no avail unless they can be adequately presented. Essential fairness is lacking if an accused cannot put his case effectively in court."

In *White v. Ragen* (1945) 324 U.S. 766, 65 S.Ct. 978, 980, the Supreme Court said:

> " . . . it is a denial of the accused's constitutional right to a fair trial to force him to trial with such expedition as to deprive him of the effective aid and assistance of counsel."

X. An accused who is induced and coerced into entering a plea of guilty has been deprived of due process of law.

In *Walker v. Johnston* (1941) 312 U.S. 275, 61 S.Ct. 574, the Supreme Court said:

> "If he did not voluntarily waive his right to counsel, or if he was deceived or coerced . . . into entering a plea, he was deprived of a constitutional right."

In *Waley v. Johnston* (1942) 316 U.S. 101, 62 S.Ct. 964, the Supreme Court said:

> "In view of the fact that petitioner when he pleaded guilty had been represented by counsel, a majority of the court [Court of Appeals—Ninth Circuit] thought he could not by habeas corpus attack his sentence on the ground that his plea was coerced.
>
> "The Government confesses error for the reason that the habeas corpus petition raises the material issue whether the plea was in fact coerced by the particular threats alleged which stand undenied on the record, and that upon that issue petitioner is entitled to a hearing in accordance with *Walker v. Johnston,* 312 U.S. 275, 61 S.Ct. 574, 85 L.Ed. 830.
>
> "And if his plea was so coerced as to deprive it of validity to support the conviction, the coercion likewise deprived it of validity as a waiver of his right to assail the conviction."

In *Palmer v. Ashe* (1951) 342 U.S. 134, 72 S.Ct. 191, 193, the Supreme Court said, of circumstances similar to appellant's at the time he entered his plea, the following:

> "But that record does not even inferentially deny petitioner's charge that the officers deceived

him, nor does the record show an understanding plea of guilty from this petitioner, unless by a resort to speculation and surmise.

"Moreover, if there can be proof of what he charges, he is the victim of inadvertent or intentional deception by officers who, so he alleges, persuaded him to plead guilty to armed robbery by telling him he was only charged with breaking and entering, an offense for which the maximum imprisonment is only ten years as compared to twenty years for armed robbery."

In *Leyra v. Denno* (1954) 347 U.S. 556, 74 S.Ct. 716, the Supreme Court, discussing a coerced confession which is analogous to a coerced plea, said:

"The New York Court of Appeals reversed on the ground that one of the confessions, made to a state-employed psychiatrist, had been extorted from petitioner by coercion and promises of leniency in violation of the Due Process Clause of the Fourteenth Amendment.

"The use in a state criminal trial of a defendant's confession obtained by coercion — whether physical or mental — is forbidden by the Fourteenth Amendment."

The terms "fear" or "hope" are the same thing, in effect, as "threat" or "promise" (III Wigmore on Evidence (3d Edition) §825). Modern usage generalizes by employing the term "inducement" to cover all modes of influence, such as promise, threat, duress, coercion, fear and hope (III Wigmore on Evidence (3d Edition) §824).

XI. An order dismissing a petition for a Writ of Habeas Corpus, without issuing an order to show cause or holding a hearing, is reviewable *de novo* on appeal.

In *Ex Parte Quirin* (1942) 317 U.S. 1, 63 S.Ct. 1, 9, the Supreme Court said:

> "Presentation of the petition for judicial action is the institution of a suit. Hence denial by the district court of leave to file the petitions in these causes was the judicial determination of a case or controversy, reviewable on appeal to the Court of Appeals and reviewable here by certiorari."

In *Ex Parte Mitsuye Endo* (1944) 323 U.S. 305, 65 S.Ct. 208, the Supreme Court said:

> "The fact that no respondent was ever served with process or appeared in the proceedings is not important."

In *Hawk v. Olson* (1945) 326 U.S. 271, 66 S.Ct. 116, 117, the Supreme Court said:

> "As no response was filed or evidence received in the district court, we, * * * in the exercise of the duty which lies on us as well as the Nebraska courts to safeguard the federal constitutional rights of petitioner, *examine for ourselves* whether under the facts stated the petitioner is now entitled to a hearing on the claimed violations of the due process clause in his conviction for murder in the first degree." (Emphasis added)

In *Baker v. Ellis* (5 Cir., 1952) 194 F.2d 865:

> "The District Court declined either to award the writ of habeas corpus or to enter a show cause order * * * It cannot be doubted that the judgment is such a final judicial determination of the case as is reviewable here on appeal." (*Cf. Jimenez v. Jones* (1 Cir., 1952) 195 F.2d 159)

In *In re Del-Marmol* (9 Cir., 1955) 221 F.2d 565:

> "Movant is a federal prisoner and a certificate of probable cause to appeal is unnecessary. 28 U.S.C. §2253."

In *United States v. Denno* (2 Cir., 1955) 221 F.2d 626 (Petition for habeas corpus was dismissed after oral argument):

> "Our power and obligation on this appeal would seem to follow the rule in civil causes. *Same is not to be rigidly confined since we are in as good a position as the lower court to make an over-all appraisal of the . . . record.*" (Emphasis added)

The records of the Alaska District Court are before this Court of Appeals on this appeal, the same as they were before the Washington District Court (R. 85, R. 102, 103).

XII. The guilt or innocence of the petition is not a proper subject for consideration in a Habeas Corpus proceeding.

In *Moore v. Dempsey* (1923) 261 U.S. 86, 43 S.Ct. 265, the Supreme Court said:

> "The petitioners say that Lee must have been killed by other whites, but that we leave on one side as what we have to deal with is not the petitioners' innocence or guilt but solely the question whether their constitutional rights have been preserved."

In *Ex Parte Quirin* (1942) 317 U.S. 1, 63 S.Ct. 1, 9, the Supreme Court said:

> "We are not here concerned with any question of the guilt or innocence of prisoners."

In *Richards v. Matthews* (U.S. Court of Appeals D.C., 1953) 207 F.2d 227:

> "We will not consider the guilt or innocence of the accused."

XIII. Title 28 U.S.C.A. §2255 has no application to Territorial Courts since they are not Courts created by an act of Congress.

Appellant was indicted for violation of a Territorial law created by an act of the Alaska Legislature, *viz.,* A.C.L.A. §65-4-1, which law defines first degree murder. In the United States first degree murder is defined in Title 18 U.S.C.A. §1111. Appellant was adjudged guilty and committed by act of the District Court for the District of Alaska. That District Court was created by an act of the Alaska Legislature, *viz.,* A.C.L.A. §53-1-1.

The legislature of Alaska has the same powers that the legislatures of the various states have, except, that under the provisions of the Alaska Organic Act §20, Congress has the power to disapprove laws passed by the legislature of Alaska. Congress may not do that with state laws. However, if Congress does not disapprove a law it stands in full effect, and, even if Congress does disapprove a law, the same is valid from the time of its passage, until so disapproved (*Cf., Atchison, T. & S. F. R. Co. v. Sowers* (1909) 213 U.S. 55, 29 S.Ct. 397).

A statute of a territorial legislature, although identical in terms with a general act of Congress, is not a law of the United States. Where Congress has expressly reserved the power to annul, as well as approve, a territorial act, such territorial act is not made an act of Congress by its approval by Congress, either expressly or by acquiescence, or by its approval in part (86 C.J.S. 629, Territories §22).

Title 28 U.S.C.A. §2255 was intended only to change the forum for collateral attacks on convictions from the District Court with territorial jurisdiction of the petitioner to the District Court of sentencing. Section 2255 provides collateral attack on the exact same grounds as habeas corpus. Motion under §2255 is habeas corpus in the sentencing court.

Alaska habeas corpus is defined under A.C.L.A. (1949) §66-26-1 to §66-26-46. Habeas Corpus in Alaska was created by an act of the Alaska Territorial Legislature and is not the same Habeas Corpus as found under Title 28 U.S.C.A. §2241 to §2254, in the United States.

The Organic Act of the Territory of Alaska makes Alaska, in effect, a sovereign state, concerning matters of a local nature. Habeas Corpus in Alaska is not only local in nature, but it is different and separate from Habeas Corpus in the United States. The provision in §2255, which prescribes that the (District) Court shall not entertain a petition for a writ of Habeas Corpus, unless a motion to the sentencing court for the same relief is inadequate or ineffective, does not apply to Alaska territorial courts. The very provision that "An application for habeas corpus * * * shall not be entertained * * * ," means an application for habeas corpus under Title 28 U.S.C.A. §2241 *et seq.*

Appellant cannot come in under the Alaska habeas corpus laws and petition a United States District Court for habeas corpus relief, because the Alaska laws do not confer that power to United States District Courts, and, likewise, Title 28 U.S.C.A. §2241 *et seq.,* confers

habeas corpus jurisdiction on United States District Courts and not on the District Courts of the Territory of Alaska, for they are not United States District Courts.

Section 2255 is only a change in procedure and procedural laws of the United States are not applicable to Alaska (cf. *Starlof et al. v. United States* (9 Cir., 1927) 20 F.2d 32; *United States v. Bell* (1953) 14 Alaska 142, 108 F.Supp. 777).

In *Miner's Bank v. State of Iowa* (1851) 12 Howard 1, the Supreme Court held (we quote headnote 2 which we find accurate):

> "Though by the fundamental law of a territory its legislation is to be subject to the disapproval of congress, yet till disapproved it is valid and operative; *it does not owe its effect to the action of congress thereon, so as to become an act of congress.*" (Emphasis added)

In *Mookini v. United States* (1938) 303 U.S. 201, 58 S.Ct. 543, the Supreme Court said:

> "Courts of the Territories are legislative courts, properly speaking, and are not District Courts of the United States. We have often held that *vesting* a territorial court with jurisdiction similar to that vested in the District Courts of the United States does not make it a 'District Court of the United States.'" (Emphasis added)

In *Connella v. Haskell* (8 Cir., 1907) 158 Fed. 285, 287:

> "The acts of the Legislature of a territory are not laws of the United States. * * * [Citations] * * * A person imprisoned pursuant to a judgment of a court of a territory for the violation of a ter-

ritorial law, is not in custody 'under or by virtue of the authority of the United States.' The case is therefore to be regarded as not differing from one in which the imprisonment is by virtue of a judgment of a state court for a violation of a state law."

In *United States v. Farwell* (D.C., Alaska 3 Div., 1948) 76 F.Supp. 35, 40:

"Although Alaska is not a state it is an organized and incorporated territory, *Rassmussen v. United States,* 197 U.S. 516, 25 S.Ct. 514, 49 L.Ed. 862, and its status is thus distinguished from that of possessions of the United States such as Puerto Rico, and, formerly, the Philippines. . . . "

In *United States v. Twelve Ermine Skins* (D.C. Alaska 3 Div., 1948) 78 F.Supp. 734:

"It is not possible to enter a judgment of forfeiture notwithstanding the verdict under our practice as I conceive it to be. That might be done under the Federal Rules of Civil Procedure, 28 U.S.C.A. following section 723c, but those rules are not in effect here."

In *Ex Parte Mulvaney* (U.S. Dist. Ct. Dist. Hawaii, 1949) 82 F.Supp. 743:

"Yet the sovereignty whose substantive law was allegedly transgressed was that of the Territory of Hawaii.

"The sovereignty offended alone has the power and right to prosecute the accused for the substantive offense of rape committed within its exclusive jurisdiction."

In *Jones v. United States* (9 Cir., 1949) 175 F.2d 544 (Headnote 2):

"In prosecution in the District Court for the

Territory of Alaska for murders, the Alaska law controlled."

In *Ex Parte Krause* (Dist. Ct., W.D. Washington, N.D., 1915) 228 Fed. 547, 549, 551:

"By act of Congress the territory of Alaska, under the Constitution and laws of the United States, became an inchoate state, not yet admitted, but organized, with separate Legislature, under a territorial Governor and other officers appointed by the President by consent of the Senate. The legislative power extended to all rightful subjects pertaining to local self-government not inconsistent with the laws and Constitution of the United States. That Congress had in mind the different relation of the local laws of the territory and national laws with relation to extradition or removal, I think is made manifest by the provisions of the Alaska Criminal Code and the general provisions of Congress.

"The Compiled Laws of Alaska have no greater force than a law enacted by a territorial legislature, subject to congressional approval, and as such its provisions are not laws of the United States, and do not come witin the cognizance of the United States courts * * * [Citations] * * * Chief Justice Marshall, in *United States v. Burr* (No. 14,694) 25 Fed. Cas. 188, says: 'No man can be condemned * * * in the federal courts on a state law.' " (*Cf. U. S. v. Wright* (D.C. Hawaii, 1954) 15 F.R.D. 184)

In *U. S. v. Doo-noch-keen* (1905) 2 Alaska 624:

"The [Alaska] District Court acts in a dual capacity for the purpose, first, of administering the local laws under the Code, and, as such, is considered a territorial court, and, second, for the pur-

pose of administering the laws of the United States which may be applicable to the district, and which are federal laws as contradistinguished from the local laws."

In *U. S. v. North Pac. Wharves & Trading Co.* (1912) 4 Alaska 552 (headnote 1):

"Since March 3, 1909, the district court of Alaska is granted dual jurisdiction; that is the jurisdiction of an ordinary court of record to hear, try, and determine all causes, both civil and criminal, of a local nature, and also the same jurisdiction as a district court of the United States, as well as the jurisdiction of a district court of the United States exercising the jurisdiction of a circuit court of the United States."

The Court of Alaska sits in a dual capacity. It sits as a court to administer territorial laws and, by an act of Congress confering jurisdiction, it also sits, when necessary, as a District Court to administer the laws of the United States. It may not be said from this, however, that the District Court of Alaska was created by an act of Congress. Congress has only granted Alaska District Courts United States jurisdiction when not locally inapplicable.

The law on this point is well settled, as shown by the following excerpt quoted from 39 Corpus Juris Secundum, Habeas Corpus, §66:

"A person imprisoned pursuant to a judgment of a court of a territory for the violation of a territorial law is not in custody under or by color of the authority of the United States within the statute * * * [28 U.S.C.A. §2241 is referred to] * * * authorizing the issuance of the writ by the federal

courts, but the proper federal court has power to grant a habeas corpus if the detention is in violation of the federal Constitution, or the laws or treaties of the United States."

To hold that §2255 applies to Alaska, would be to hold that prisoners in Alaska under commitment of an Alaska District Court could not avail themselves of the Alaska habeas corpus law, unless a motion for the same relief sought, to the same court, was inadequate or ineffective. The Alaska Territorial Court is but one court, though the judges thereof sit in different places within the district (cf. *Hemmingson v. Libby McNeil & Libby* (D.C. Alaska, 1950) 89 F.Supp. 502). Appellant cannot petition for habeas corpus relief when he is without the territorial limits of Alaska.

Such a holding would have the effect of suspending the writ of habeas corpus in Alaska. Applying §2255 to Alaska, suspends a law that Congress did not make. That section may apply to some possessions, but not organized territories. Suppose the Alaska habeas corpus law was disapproved by Congress, and we held that §2255 was applicable to Alaska, and in a particular case it was inadequate and ineffective. Where, and to whom, does the Alaska prisoner go for relief? Congress has provided no other remedy. Title 28 U.S.C.A. §2241, *et seq.,* does not help.

XIV. If Title 28 U.S.C.A. §2255 applies to the District Court of the Territory of Alaska, such application would not have the effect of withholding jurisdiction from United States District Courts in Habeas Corpus proceedings involving Alaska prisoners when it is shown that §2255 is inadequate or ineffective.

Section 2255 is nothing more than habeas corpus in another forum under the name of "Motion," and whether it be called a collateral attack or a direct attack limited to collateral grounds is immaterial. The following cases show the courts have called in both. In either event, however, §2255 may not take the place of an appeal or writ of error and relief thereunder may be granted on collateral grounds only as is traditional in habeas corpus.

In *Birtch v. U. S.* (4 Cir., 1949) 173 F.2d 316, 317:

> "It should be borne in mind that the purpose of the section was not to enlarge the class of attacks which may be made upon a judgment of conviction, but to provide that the attack must be made in the court where the sentence was imposed and not in some other court through resort to habeas corpus, unless it appears that the remedy by motion is inadequate."

In *Hurst v. U. S.* (10 Cir., 1949) 177 F.2d 894:

> "It does not enlarge the class of attacks which may be made upon a judgment of conviction, but provides that the attack must be made in the court where the sentence was imposed and not in some other court through resort to habeas corpus, unless it appears that the remedy by motion is inadequate. It is limited to matters that may be raised by collateral attack."

In *Meyers v. Welch* (4 Cir., 1950) 179 F.2d 707, 708:

> " . . . the prisoner has no right to relief by habeas corpus where there exists the right to relief under 28 U.S.C.A. Section 2255; and the fact that the motion has been denied does not give the right to resort to habeas corpus, even if the movant is entitled to relief, since the remedy in such case is by appeal. Only where the remedy by motion with appeal therefrom is inadequate or ineffective to test the legality of his detention may there be resort to habeas corpus."

In *Davilman v. U. S.* (6 Cir., 1950) 180 F.2d 284, 286:

> "Prisoners adjudged guilty of crime should understand that 28 U.S.C.A. Section 2255 does not give them the right to try over again the cases in which they have been adjudged guilty. Questions as to the sufficiency of the evidence or involving errors either of law or of fact must be raised by timely appeal from the sentence if the petitioner desires to raise them. Only where the sentence is void or otherwise subject to collateral attack may the attack be made by motion under 28 U.S.C.A., Section 2255, which was enacted to take the place of habeas corpus in such cases and was intended to confer no broader right of attack than might have been made in its absence by habeas corpus."

In *Bruno v. U. S.* (U.S. Court of Appeals D.C., 1950) 180 F.2d 393, 395, the court says:

> "We observe that the language of Sec. 2255 shows Congress intended the motion to vacate thereunder for use only when the original judgment sought to be corrected thereby is subject to collateral attack. The section permits the attack to be made at any time, regardless of the limitation of Rules 33, and provides 'An appeal may be taken

to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.'

"We hold, therefore, that a motion made under Sec. 2255 is the beginning of a new proceeding, independent of that in which the judgment it attacks was entered."

In *Barrett v. Hunter* (10 Cir., 1950) 180 F.2d 510, 514:

"The grounds for a motion to vacate, under §2255, encompass all of the grounds that might be set up in an application for a writ of habeas corpus predicated upon facts that existed at or prior to the time of imposition of sentence.

"If the motion and the records and files of the case conclusively show that the prisoner is not entitled to any relief, the court is not required to entertain the motion.

"In conventional habeas corpus, the court is not required to issue the writ if, on the face of the petition, it appears that petitioner is not entitled to the writ, or if, from undisputed facts, such as those recited in a court record, it appears, as a matter of law, no cause for granting the writ exists . . . "

In *Hudspeth v. U. S.* (6 Cir., 1950) 183 F.2d 68, 69:

"Moreover, §2255 of the Judicial Code provides a remedy co-extensive with habeas corpus and so errors of fact or law at the trial may not thereunder be raised if the court has jurisdiction. Only where the sentence is void or otherwise subject to collateral attack may the attack be made by motion under that section."

In *Hastings v. U. S.* (9 Cir., 1950) 184 F.2d 939:

"A proceeding under §2255 is intended as a substitute for habeas corpus. The contentions here urged would not be considered in habeas corpus proceeding."

In *Crow v. U. S.* (9 Cir., 1950) 186 F.2d 704, 706:

"It was intended to provide a prisoner, in custody under sentence of a court established by an Act of Congress, an exclusive remedy for determining the legality of his detention in the court which imposed the sentence, where the matter could most readily and conveniently be heard, and to make the final determination with respect to the legality of such detention conclusive, except in cases where the remedy thus provided was inadequate or ineffective to test the legality of such detention.

"Section 2255 does not extend the class of attacks which may be made upon a judgment of conviction. It substituted a frontal for a collateral attack on any ground mentioned therein. It was not meant to broaden the scope of attack upon a judgment and sentence permissible under habeas corpus but rather to confine the relief, which before the adoption of this section might have been afforded in some other court through resort to habeas corpus, to the court where the sentence was imposed, unless it should appear that the remedy thereunder is inadequate or ineffective to test the legality of detention. The court's jurisdiction thereunder is coextensive with the jurisdiction of the court passing upon an application for the writ."

The case of *Hallowell v. Hunter* (10 Cir., 1951) 186 F.2d 873, also directly holds that Section 2255 is limited to matters that may be raised by collateral attack, *i.e.,* habeas corpus.

In *Smith v. United States* (U.S. Court of Appeals D.C., 1950) 187 F.2d 192, 195:

> "We recently indicated that the scope of review on such attack is the same as in habeas corpus cases. * * * [Citation] * * * Section 2255 was enacted, as stated in the Reviser's Notes, to provide 'an expeditious remedy for correcting erroneous sentences without resort to habeas corpus.''

In *Clough v. Hunter* (10 Cir., 1951) 191 F.2d 516, 518:

> "We have held that Section 2255 was designed to supplant habeas corpus by affording the same relief in the sentencing court under Section 2255 and that a proceeding thereunder was conclusive save only in those cases where the remedy thereunder was inadequate and ineffective. . . . We have repeatedly held that the grounds that may be urged for relief by motion are the same as could be raised by habeas corpus.''

In *Taylor v. U. S.* (10 Cir., 1952) 193 F.2d 411, the court said at page 412:

> "Although the proceeding is a direct attack upon the judgment, the rights granted under the statute are limited to those available on a collateral attack.''

In *U. S. v. Bradford* (2 Cir., 1952) 194 F.2d 197, 200:

> "The section 'was passed * * * to meet practical difficulties that had arisen in administering the habeas corpus jurisdiction,' and its 'sole purpose was to minimize the difficulties encountered in habeas corpus hearings by affording the same rights in another and more convenient forum.' Thus the section should be read as coextensive in substance with the writ, and as confined to amending the procedure. . . . ''

In *Markham v. U. S.* (4 Cir., 1954) 215 F.2d 56:

> "28 U.S.C. §2255, . . . is available only where the sentence is void or otherwise subject to collateral attack."

In *United States v. Jonikas* (7 Cir., 1952) 197 F.2d 675, 676:

> "The purpose of the proceeding provided for by U.S.C.A. §2255 is to give the prisoner a method for a direct attack on his sentence in the court in which he was tried and sentenced; but to attack the sentence successfully in such a proceeding the prisoner must have grounds which would support a collateral attack on the sentence."

In *Risken v. U. S.* (8 Cir., 1952) 197 F.2d 959, 961:

> "A motion to vacate a judgment is a collateral attack upon the judgment, and only such grounds may be urged as would be available in habeas corpus proceedings."

In *Kreuter v. U. S.* (10 Cir., 1952) 201 F.2d 33, the court also holds that Section 2255 and habeas corpus are one and the same thing being different only as to forum.

In *Kellner v. Metcalf* (9 Cir., 1953) 201 F.2d 838, the court holds that §2255 and habeas corpus are both collateral attacks.

The *Hayman* case is the leading Supreme Court case on Section 2255. That case sets forth several reasons why Section 2255 was originally conceived and passed. In *United States v. Hayman* (1951) 342 U.S. 205, 72 S.Ct., 263, the Supreme Court said:

> "The need for Section 2255 is best revealed by a review of the practical problems that had arisen in

the administration of the federal courts' habeas corpus jurisdiction.

"Nowhere in the history of Section 2255 do we find any purpose to impinge upon *prisoners' rights* of collateral attack upon their convictions. On the contrary, the *sole purpose* was to minimize the difficulties encountered in habeas corpus hearings by affording the *same rights* in another and more convenient forum." (Emphasis added)

Following this we find:

"The *very purpose* of Section 2255 is to hold any required hearing in the sentencing court because of the inconvenience of transporting court officials and other necessary witnesses to the district of confinement." (Emphasis added)

Is "sole purpose" and "very purpose" the same thing? Under "sole purpose" we find that the prisoner's rights are supposed to be afforded him in another and more convenient forum. Under the "very purpose" we find that the court officials and government witnesses are afforded a more convenient forum. For whose convenience was Section 2255 passed? The prisoner's or the government's?

In the *Hayman* case we also find:

"In a case where the Section 2255 procedure is shown to be 'inadequate or ineffective,' the Section provides that the habeas corpus remedy shall remain open to afford the necessary hearing.

"Under the 1867 Act [Now incorporated in 28 U.S.C.A. §2241, *et seq.*], United States District Courts have jurisdiction to determine whether a prisoner has been deprived of liberty in violation of constitutional rights, although the proceedings

resulting in incarceration may be unassailable on the face of the record. Under that Act, a variety of allegations have been held to permit challenge of convictions on facts *dehors* the record."

In *U. S. v. Morgan* (1954) 346 U.S. 502, 74 S.Ct. 247, 252, the Supreme Court said:

"In *United States v. Hayman* . . . we stated the purpose of §2255 was 'to meet practical difficulties' in the administration of federal habeas corpus jurisdiction. We added: 'Nowhere in the history of Section 2255 do we find any purpose to impinge upon prisoners' rights of collateral attack upon their convictions.' "

In *United States v. Anselmi* (3 Cir., 1953) 207 F.2d 312, 314:

"He urges that Section 2255 . . . is unconstitutional . . . We do not agree. On the contrary, Section 2255 is a remedial statute, the purpose of which is to afford to a convicted Federal prisoner a remedy which is the substantial equivalent of the conventional Writ of Habeas Corpus, but in a more convenient forum, the original trial court. To limit the prisoner to this remedial, except when it is inadequate or ineffective to test the legality of his detention, as Section 2255 does, is not to suspend the Writ of Habeas Corpus."

In *Oughton v. U. S.* (9 Cir., 1954) 215 F.2d 578:

"As stated by the Supreme Court the 'sole purpose' in enacting this section 'was to minimize the difficulties encountered in habeas corpus hearings by affording the same rights in another and more convenient forum.' "

In *U. S. v. Swope* (5 Cir., 1955) 219 F.2d 538:

"The United States, in short, citing many cases,

urges upon us that the grounds for which Sec. 2255 supplies a remedy are limited to those which may be asserted in a collateral attack upon a judgment, while all of the matters relied upon by petitioner in his motion are in the nature of newly-discovered evidence as to the use of alleged perjured evidence or of the alleged insufficiency of the evidence, none of which may be asserted in a collateral attack.

"We find ourselves in complete agreement with these views."

There is not too much doubt (except in appellant's mind) about the constitutionality of Section 2255. It is well established that Section 2255, unless inadequate or ineffective, is the exclusive remedy for collateral attacks on convictions. This also means an appeal must be taken from a denial, and resort to habeas corpus cannot be had.

In *Smith v. Reid* (U.S. Court of Appeals D.C., 1951) 191 F.2d 491, the court held that failure to succeed under §2255 does not authorize habeas corpus.

In *Higgins v. Steele* (8 Cir., 1952) 195 F.2d 366, 368:

"Whatever doubts there may have been as to the validity of Section 2255 have now been put at rest by *U. S. v. Hayman,* 342 U.S. 205, 72 S.Ct. 253."

In *Butler v. Looney* (10 Cir., 1955) 219 F.2d 146, 147:

"The purpose of proceedings under Section 2255 is to provide that an attack on a judgment which previously might have been made in habeas corpus proceedings, must be made by motion filed in the criminal case where the judgment was entered. Proceedings thereunder are conclusive unless the remedy by motion is inadequate and ineffective

> * * * [citations] * * * Except in cases where the remedy is inadequate or ineffective, proceedings under Section 2255 are exclusive."

In *Osborne v. Looney* (10 Cir., 1955) 221 F.2d 254:

> "A judgment may be attacked only under Section 2255, unless it is shown that the remedy thereunder is inadequate and ineffective."

In *Trice v. United States* (9 Cir., 1955) 218 F.2d 588, this court holds that an appeal must be taken from a denial of a motion under Section 2255 and that habeas corpus relief may not be sought in the place of appeal.

Other Court of Appeals cases holding that Section 2255 is the exclusive remedy for collateral attack are: *Jones v. Squier* (9 Cir., 1952) 195 F.2d 179; *Winhoven v. Swope* (9 Cir., 1952) 195 F.2d 181; *Booth v. United States* (9 Cir., 1952) 198 F.2d 991; *Bozell v. Welch* (4 Cir., 1953) 203 F.2d 711; *Mills v. Hunter* (10 Cir., 1953) 204 F.2d 468; *Whiting v. Hunter* (10 Cir., 1953) 204 F.2d 471; *Halloway v. Looney* (10 Cir., 1953) 207 F.2d 433; *Werntz v. Looney* (10 Cir., 1953) 208 F. 2d 102; *United States v. Josey* (3 Cir., 1954) 210 F.2d 826; *Wright v. Looney* (10 Cir., 1954) 212 F.2d 186; *United States v. Davis* (3 Cir., 1954) 212 F.2d 681.

When Section 2255 is shown to be inadequate or ineffective habeas corpus is available. Only when there is no such showing or when relief under Section 2255 was denied will habeas corpus be withheld. Appellant has shown, by uncontroverted verified petition, that relief under Section 2255 has not been denied him and that it is inadequate and ineffective to test the legality of his detention.

In *Decatur v. Hiatt* (5 Cir., 1950) 184 F.2d 719:

"In his petition for habeas corpus for release from confinement, appellant alleged that he had applied by motion for relief under Sec. 2255, 28 U.S.C.A., but he did not show that he had prosecuted the motion with effect. Neither did he show that such remedy by motion was 'inadequate or ineffective to test the legality of his detention.' Notwithstanding this failure and the fact that the record showed that the motion under Sec. 2255 had been denied, the district judge entertained his petition, heard and considered his claim that he was entitled to release on habeas corpus because his plea of guilty had been induced by the threat that he would be prosecuted for making his escape from and assaulting officers unless he entered a plea of guilty.

"The hearing ended, the district judge, concluding that petitioner was not entitled to the relief prayed, denied his petition, and he has appealed.

"In view of the denial of appellant's motion for relief under Sec. 2255 and of the failure of the record to show that the remedy by motion was 'inadequate or ineffective to test the legality of his detention,' we could properly affirm the judgment without further inquiry. Since, however, the district judge did in fact entertain the petition, we have concluded to consider the appeal on its merits . . ."

In *Hallowell v. Hunter* (10 Cir., 1951) 186 F.2d 873, 874:

"We hold * * * that an application for a writ of habeas corpus * * * should not be entertained where the sentencing court denied the applicant relief under § 2255 and the applicant failed to allege facts in his application for the writ showing that

the remedy by motion under § 2255 was inadequate or ineffective to test the legality of applicant's detention."

In *Barnes v. Hunter* (10 Cir., 1951) 188 F.2d 86, 88:

"It is not the function of this court on an appeal from an order denying an application for a writ of habeas corpus to review the action of the sentencing court in denying a motion to vacate a sentence filed under § 2255, *supra.* Our sole inquiry with respect to the proceedings on such a motion is whether the applicant for the writ has shown that his remedy by motion under § 2255, *supra,* was inadequate or ineffective to test the legality of his detention."

In *Owens v. Hinds* (10 Cir., 1951) 189 F.2d 518, the court denied habeas corpus only because petitioner made no showing that § 2255 was inadequate or ineffective.

In *Voltz v. Steele* (8 Cir., 1951) 191 F.2d 811, the court's opinion is:

"The appellant is confined in the Medical Center for Federal Prisoners at Springfield, Missouri, under a sentence of imprisonment imposed by the United States District Court for the Northern District of Alabama. He filed a petition for a writ of habeas corpus in the United States District Court for the Western District of Missouri. His petition did not show that he had applied to the court which sentenced him for a vacation of his sentence, pursuant to Section 2255, Title 28, U.S.C. The District Court correctly ruled that it was not authorized to entertain the petition."

In *Wheatley v. Hunter* (10 Cir., 1951) 192 F.2d 376, the court's opinion is:

"This is an appeal from an order dismissing a writ of habeas corpus. The application wholly failed to allege that the petitioner had applied for relief under 28 U.S.C.A., Section 2255, or that the court which sentenced him had denied him relief under that section, and that remedy by motion under that section was inadequate or ineffective to test the legality of his detention. The order is affirmed."

In *Duquesne v. Steele* (8 Cir., 1952) 197 F.2d 56:

"The appellant's petition for a writ failed to show that he had applied to the court which sentenced him for the vacation of his sentence, under Section 2255, Title 28, U.S.C.A. It was upon this ground that his petition was denied by the District Court for the Western District of Missouri."

In *Sorrentino v. Swope* (9 Cir., 1952) 198 F.2d 789, 790:

"The language of Section 2255 expressly provides that in a case where the procedure established by that section is 'inadequate or ineffective' the petitioner may then seek a writ of habeas corpus. The record does not indicate that a motion under Section 2255 would have been 'inadequate or ineffective'."

In *King v. United States* (10 Cir., 1954) 214 F.2d 712, we have an appeal from an order dismissing an application for a writ of habeas corpus, the court affirmed and said:

"King wholly failed to allege any facts showing that the remedy by motion under 28 U.S.C.A. § 2255 was inadequate or ineffective to test the legality of his detention."

In *Butler v. Looney* (10 Cir., 1955) 219 F.2d 146:

> "The purpose of proceedings under Section 2255 is to provide that an attack on a judgment which previously might have been made in habeas corpus proceedings, must be made by motion filed in the criminal case where the judgment was entered. Proceedings thereunder are conclusive unless the remedy by motion is inadequate and ineffective * * * [Citations] * * * Except in cases where the remedy is inadequate or ineffective proceedings under Section 2255 are exclusive * * * [citing cases]. In a habeas corpus proceeding, the sole function of the court is to determine whether the remedy by motion under Section 2255 is inadequate or ineffective * * *."

In *Frisbie v. Collins* (1952) 342 U.S. 519, 72 S.Ct. 509, the Supreme Court cites *Darr v. Burford* (1950) 339 U.S. 200, 70 S.Ct. 587, on the problem of exhaustion of remedies, which is somewhat analogous (Cf. *United States v. Hayman* footnote 40) to a case where Section 2255 is involved, and says:

> " 'this general rule is not rigid and inflexible; district courts may deviate from it and grant relief in special circumstances. Whether such circumstances exist calls for a factual appraisal by the court in each special situation. Determination of this issue, like others, is largely left to the trial courts subject to appropriate review by the courts of appeals'."

From *Barrett v. Hunter* (10 Cir., 1950) 180 F.2d 510, we quote Judge Huxman's dissenting opinion, which, to a large degree, expresses appellant's view in this particular case, if Section 2255 is held to apply to Alaska:

"In *Stidman v. Swope,* D.C., 82 F.Supp., 931 Chief Judge Denman granted an application for the writ without requiring compliance with Section 2255. No attempt will be made to quote from that opinion. It is sufficient to say that I am in accord with its philosophy. To square with the concept of due process, there must not only be a remedy but the remedy must also be speedy and effective. I have grave doubts whether Section 2255 can ever be an effective remedy, save in those cases in which the sentencing court is in the same jurisdiction with the institution of confinement.

"To illustrate: Suppose a person sentenced to Alcatraz from the Federal Court in the District of Florida, or to McNeil Island by a Texas court, or to Atlanta by a court in the State of Washington, seeks to challenge the validity of the sentence in the sentencing court. May we not take knowledge of the fact that it would impose an onerous burden to transport these prisoners thousands of miles back and forth from their place of service of sentence to the sentencing court, with attendant guards, in armored cars, etc. Would it be possible to accord to petitioner that speedy remedy to which he is entitled if the sentence, in fact, is void? Would he have an opportunity to confer with an attorney, appointed for him by the sentencing court, prior to the time of trial to prepare his case, or to subpoena and interview witnesses? It seems to me the answer is obvious.

"The end sought to be accomplished does not justify the means unless it squares with the judicial concept and accords with constitutional requirements * * *

"Section 2255 is not free from ambiguity. This would appear not only from the language itself

> but also from the fact that already judges skilled in law have reached conflicting conclusions. Thus the language that 'an application for a writ of habeas corpus * * * shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him * * *,' would seem to support a construction that compliance was a prerequisite and not a substitute for habeas corpus. It may be that the remaining language warrants a construction that it is the exclusive remedy other than in cases in which the remedy by motion is inadequate or insufficient — whatever that means—to test the legality of the detention."

In *United States v. Handy* (1955) 130 F.Supp. 270, 273:

> "Has the applicant met the burden of showing that he has exhausted the remedies available * * * ? Respondent argues that the Pennsylvania Supreme Court did not directly meet and dispose of the question of hysteria and prejudice.
>
> "A remedy may be exhausted by affirmative use thereof and failure therein or by inaction or failure to resort thereto."

The Washington District Court in its first order of dismissal indicated that appellant's route of relief from the inaction of the Alaska court was by appeal (R. 91). This route, however, was not open to appellant (Cf. *Kellner v. Metcalf* (9 Cir., 1953) 201 F.2d 838).

In its second order of dismissal the Washington District Court suggested that appellant's remedy was by writ of mandamus directed to the Alaska court (R. 98). Such burden, if upheld, renders § 2255 unconstitutional.

If § 2255 is habeas corpus in another forum, it must afford the same relief. It must be adequate to cover all forms of collateral attacks traditional to habeas corpus. It must be effective with the same rapidity as is traditional to habeas corpus. Many times there will be more delay than would be caused by habeas corpus. Such delays are to be expected because of the great distances prisoners very often are from the sentencing courts. However, when the speedy relief of § 2255 is delayed for some reason other than the normal procedural delays incident thereto, it becomes inadequate as a speedy remedy and habeas corpus should be allowed. Our individual citizens are all alike in that they have but one life to live. Our laws are not designed to imprison them without affording them due process and upholding their constitutional rights, and when they are imprisoned and claim they have been denied these fundamental guarantees our laws are designed to allow them a speedy hearing to determine the true facts.

The following language from *Johnston v. Zerbst* (1938) 304 U.S. 458, 58 S.Ct. 1019, 1025, is highly appropriate in this case so far as appellant's contentions are concerned:

> "If these contentions be true in fact, it necessarily follows that no legal procedural remedy is available to grant relief for a violation of constitutional rights, unless the courts protect petitioner's rights by habeas corpus * * * * To deprive a citizen of his only effective remedy would not only be contrary to the 'rudimentary demands of justice' but destructive of a constitutional guaranty specifically designed to prevent injustice."

CONCLUSION

It is respectfully submitted, that this court should examine the allegations of the petition in this proceeding and compare them with the Alaska court's records. Many allegations *dehors* the record and are sufficient to raise serious questions. Others are borne out by the record and patently show that due process has been denied in this case. The order of the United States District Court for the Western District of Washington, Northern Division, heretofore entered on the 26th day of May, 1955, should be reversed.

Respectfully submitted,

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